SUPREME COURT, U. S.

FILED

FEB 13 1968

JOHN F. DAVIS, CLERK

No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A., PETITIONER

v.

JOHN LISI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD AS AMICUS CURIAE

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In June 1967, at the invitation of the Court, the government filed a memorandum suggesting that the decision below was correct.[1] That memorandum also pointed out that the Civil Aeronautics Board had not purported to pass upon, much less to decide, the size of type face or other typographical details which the airlines should employ in printing the warning re-

[1] In a memorandum filed on December 22, 1967, in response to an invitation from the Court in *Berguido* v. *Eastern Airlines, Inc.*, No. 528, this Term, the government reiterated its position that a ticket purporting to warn of limited liability under the Warsaw Convention does not of itself comply with Article 3 of the Convention if printed in type too small to attract reasonable notice.

quired with respect to limited liability under the Warsaw Convention. In light of the fact that the briefs of petitioner and others urging reversal, filed since the Court granted the petition, contain various statements as to the meaning and effect of the Board's past actions and its authority over the subject matter of the notice requirement, we submit this memorandum to clarify the Board's role in this area.

The air carriers have at no time presented for Board approval any agreement relating to the size of type to be utilized in relation to any matter appearing on a ticket, either generally or in relation to the Warsaw Convention. Prior to the accident here involved, the Board, pursuant to the provisions of Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, had regularly approved agreements containing the language in which the warning regarding limited liability was couched, and also had accepted for filing various tariff rules containing such language. As far as the Board was concerned, however, the carriers were at liberty to utilize any type they chose, and otherwise to determine the typographical manner in which the warning was given. Furthermore, the Board had not at any time expressed any views on the size of type necessary to give adequate notice to the public. It was not until 1964 that the Board imposed a requirement for minimum type size and for use of contrasting ink and stock with respect to such warning. Even then, that requirement was imposed primarily under the tariff filing provisions of Section 403, of the Act, 49 U.S.C. 1373, and did not purport to represent any Board determination that the Warsaw Convention requires

either larger or smaller type. While the views of the Board as the agency charged with regulating air transportation under the Federal Aviation Act might be persuasive with respect to what constitutes adequate notice under the Warsaw Convention, the Board has not taken the position that the adjudication of this matter is within its primary expertise, nor has it acted on such a premise. The Board recognizes no reason why the question of what the Warsaw Convention requires may not be decided judicially as an independent matter.

I

An understanding of the nature and effect of the Board's actions will be facilitated by a brief description of the statutory provisions involved. Section 412 of the Federal Aviation Act requires that air carriers file with the Board copies of their agreements with other carriers which affect air transportation, and directs the Board to disapprove any such agreement which it finds to be adverse to the public interest or in violation of the Federal Aviation Act. If the Board does not make such findings, the statute directs the Board to approve the agreement. A consequence of approval is to relieve the carriers involved from the restraints imposed by the antitrust laws and related statutes.[2]

The Board asserts the authority to impose, as a condition of its approval of a particular agreement, qualifications which it deems necessary to safeguard the overall public interest. In this way the Board

[2] Section 414, 49 U.S.C. 1384.

on occasion may require action which it could not otherwise demand. Since, however, hundreds of agreements are filed each year, the Board is not in a position to explore exhaustively the legality of particular agreements under other laws (including treaties), or to focus upon every conceivable circumstance in which the public interest might be served through the attachment of conditions.

Additionally, Section 403 of the Act requires that carriers file their tariffs with the Board. Under familiar principles, provisions for exculpation from liability may be included therein and, in appropriate circumstances, have the force of law. (The Board ordinarily accepts for filing those tariffs which conform to its rules, and the mere acceptance of a tariff constitutes no determination as to the lawfulness of any provision contained therein.) Furthermore, the implementation of an agreement between carriers on the subject of rates or liability may depend on the filing with the Board of tariffs embodying the agreed-upon rate or exculpatory provision.

Finally, Section 204 of the Act, 49 U.S.C. 1324, vests in the Board the broad investigative and rule-making authority necessary to the discharge of its duties.[3]

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[3] Section 204(a) provides (49 U.S.C. 1324(a)):

> The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

II

In 1949, the Board had before it the initial IATA Traffic Conference resolutions establishing a uniform passenger ticket, baggage check, and air waybill, as well as IATA's proposed conditions on liability for injury to passengers, baggage and cargo in international transportation. Included in the liability provisions was a proposed warning to be placed in the carriers' tickets to give notice of the Warsaw Convention.[4] The carriers represented, and the the Board agreed, that the adoption of uniform ticketing and interline arrangements between carriers would produce significant benefits to the traveling public, and on the basis of these considerations the Board approved the use of a uniform ticket, *IATA Traffic Conference Resolutions,* 10 C.A.B. 783.[5] There was, however, no request that the Board approve any particular size for the ticket or the type, and indeed it appears that not even a specimen ticket was pre-

[4] The proposal provided: "(4) that the Conditions of Contract on the inside cover of the Passenger Ticket and Baggage Check read as follows:

"*Conditions of Contract*

* * * * *

"(2) (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention. (See Carrier's tariffs for such definition.)"

[5] See pp. 2 and 3 of the Joint Brief of ATA and IATA in this Court, pointing out the advantages of a uniform ticket.

sented for the Board's consideration.* On the contrary, the resolution in terms provided "(3) that the questions of language and size be left to each member." The Board's opinion contains no reference to the proposed language relating to the Warsaw Convention, and in dealing with other proposed exculpatory conditions the Board made plain that it was not attempting to pass upon the requirements of the Convention. Rather, the Board pointed out (10 C.A.B. at p. 787) that the carriers had "represented * * * that these resolutions are not in abridgement of" the Convention, but rather that their purpose was "to place the same ceiling on liability in non-Warsaw air transportation as is provided under the Warsaw Convention * * *." Although the Board found (*id.* at p. 788) that this proposal was "a step away from the public policy of this country" with respect to carrier liability, it accepted most of the details of the conditions of carriage, including the provision relating to notice (footnote 4, *supra*), subject to further study on the part of the carriers and action by the Board. In addition, the "notice" provisions were later included in various tariffs filed with the Board, but there was no Board tariff rule then in force specifying the size of type to be utilized in the warning notice.

In 1954, the IATA carriers submitted additional resolutions relating to the uniform ticket and the limitation of liability for international passengers. One such resolution contained the warning language in substantially the same form as the 1949 resolution.

*The entire agreement filed with the Board, including the warning provision, was typed in 10 point size type.

After the over-all resolution had been initially disapproved on various grounds, see Order E–8543, 24 C.A.B. 580, informal conferences were held and the Board approved as not adverse to the public interest an amended resolution containing a notice and various other exculpatory provisions. *Pan American World Airways, et al., Conditions of Carriage,* 24 C.A.B. 575.[7] As pointed out by the Joint Brief of ATA and IATA before this Court, the Board stated that the revised notice provision had been improved. However, the Board again was explicit in declaring that its action did not constitute determination of compliance with the Warsaw Convention.[8] Furthermore, the carriers did not request Board approval of any ticket form as such, or of any proposal with respect to the size of type to be utilized therein.[9]

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[7] Again, the agreement filed with the Board, including the Warsaw Convention notice, was typed throughout in 10 point size type.

[8] In the one area in which a Warsaw compliance problem was discussed, the Board clearly distinguished between the "public interest" standard of the Federal Aviation Act and the provisions of the Convention, 24 C.A.B. at p. 577:

> [T]he Board's approval merely finds as not adverse to the public interest an agreement between the carriers to insert in their conditions of contract a provision that the agreed stopping places for the purpose of the Convention shall be the scheduled stopping place on the passenger's route shown in the timetables, and is in no sense a determination by the Board that such provision meets the requirement of the Convention that the agreed stopping places be contained in the ticket.

[9] We believe it is misleading for ATA and IATA in their Joint Brief to assert that at the time of approval the Board had before it a specimen ticket disclosing the size of type to be employed and to create thereby the inference that the Board approved such size. A specimen ticket was attached to a reso-